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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No. _____

STEVEN BENNETT,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TENNESSEE

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QUESTION PRESENTED:

Whether the Tennessee "Hired Gun" Statute, Tenn. Code Ann. § 8-7-401, which permits private attorneys to participate in public prosecutions violates both the Due Process and Equal Protection Provisions of the United States Constitution?

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IN THE
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OCTOBER TERM, 1990

No. _____

STEVEN BENNETT,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TENNESSEE

Petitioner Steven Bennett respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Tennessee Court of Criminal Appeals entered on June 7, 1990, and the denial of permission to appeal by the

Tennessee Supreme Court entered on October 15, 1990.

OPINION BELOW

The opinion of the Tennessee Court of Criminal Appeals is reprinted in the appendix. See App. at 32a. The order of the Tennessee Supreme Court denying permission to appeal is likewise reprinted in the appendix. App. at 40a.

JURISDICTION

The judgment of the Tennessee Court of Criminal Appeals was entered on June 7, 1990. Petitioner's application for permission to appeal was denied by the Tennessee Supreme Court on October 15, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Amendment 14

This provision is set forth at App. 42a.

STATEMENT OF THE CASE

On June 22, 1988, the petitioner, Steven Bennett, was placed on trial for capital murder in Blount County, Tennessee, a small rural county near the mountains of East Tennessee.

He was prosecuted by a team of three lawyers. Two of the three lawyers were private practitioners who represented the family of the deceased; the third prosecutor was an Assistant District Attorney.

The two private practitioners were law partners who had been asked by the family of the deceased to help the State seek the death penalty.

One private lawyer was the long-time chairman of the Republican party in what was a predominantly Republican county. His law partner was a member of the Executive Committee of the Democratic party

for the State of Tennessee. Both men were popular and well-regarded in the community.

Acting pursuant to the Tennessee "Hired Gun" statute which permitted privately retained lawyers to help prosecute criminal cases, both men entered appearances as co-counsel with the District Attorney in the prosecution of the Bennett case.

At the request of the deceased's family, the two "private" prosecutors met with the District Attorney and requested that the State seek the death penalty.

They were successful.

Just three weeks before the trial was to begin, the State filed a notice seeking the death penalty. The State cited a single aggravating circumstance in support of the death penalty, alleging that the single shot which was fired "knowingly created a great risk of death to two or

more persons, other than the victim . . .". Tenn. Code Ann. § 39-2-203(i)(3).[1]

Thereafter, the two private attorneys took an active and vigorous role in the prosecution of the case at trial. Both participated in voir dire and both pointed out to the prospective jury members the fact that they represented the family of the deceased. Both men introduced the mother of the deceased to the venire.

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[1] Neither the testimony of the State's own expert witness nor the testimony of three bystanders, all called by the prosecution, ever supported such a condition. The State's expert forensic pathologist testified that the single shot was discharged fully into the body of the deceased and therefore could pose no risk of death to anyone else. The bystanders testified they were unharmed in any fashion. The Tennessee case of *State v. Cone*, 665 S.W.2d 87 (Tenn. 1989) appeared to make clear that such an aggravating circumstance did not apply in cases such as this. Despite a timely objection however, the trial court permitted the case to go to the jury as a capital murder case.

Each private practitioner called witnesses on behalf of the prosecution and each participated in cross-examination of the defense witnesses.

One private attorney made the state's opening statement while the second participated in the final argument.

Ultimately one private attorney appeared at the sentencing hearing.[2]

The case which they helped prosecute was tragically simple. On Halloween night, October 31, 1987, two

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[2] The participation of these two private attorneys was vigorously but unsuccessfully challenged by the petitioner prior to trial. (App. at 1a, 14a). The trial court denied an order for an interlocutory appeal pursuant to Rule 9 of the Tenn.R.App.Proc. (App. at 30a). Petitioner then sought an extraordinary appeal to the Supreme Court of Tennessee pursuant to Rule 10 which was also denied as moot after the trial had been concluded. Hence, the constitutional issue which is now brought before this Court was in fact raised and preserved in a timely fashion. (*See*, Sup.Ct.R. 14.1(h)).

married women and their four children went trick-or-treating by car in an affluent neighborhood in Blount County. To their terror, as they were leaving the neighborhood, they were pursued by the driver of a vehicle with a dark tinted windshield. Unable to see the driver or any other occupants of the pursuing car, one of the women, Mrs. Steve Bennett, sought to flee the subdivision. The driver of the other car immediately gave chase, speeding up behind the women and children and flashing his high beam lights in an effort to blind them. When Mrs. Bennett sought to pull into a convenience store to seek help, the pursuing car pulled in front of her, blocking her path. Terrified, Mrs. Bennett told the four children to cling to the floorboard of the car as she raced for home with the children crying in hysteria.

Unable to get away, Mrs. Bennett fled down the curving country road which led to the trailer she shared with her husband Steve Bennett, the petitioner. Terrified, she drove through their front yard blowing the horn.

Steve Bennett and his brother-in-law raced to the front door, saw the darkened car and gave chase. They were unsuccessful.

Returning to the trailer, the petitioner and his brother-in-law decided to return to the suburb where the original difficulty had arisen. As they were about to leave, Mrs. Bennett handed her husband a loaded shotgun and warned him to be careful because she was not sure if the people behind the tinted windows were armed and dangerous.

The petitioner located the house where the chase had begun and found the

darkened car parked in the driveway. Angry that his wife and children had been placed in peril, Steve Bennett accosted the driver, demanding to know why he had tried to kill Bennett's family. A heated and emotional exchange ensued. Ultimately the petitioner attempted to scare the driver by firing a shot between his legs.

As the State's evidence showed, the single shot was fired downward at a 45 degree angle. It caught the driver in a crouched position in the left hip. Tragically, the shot at that close range would prove to be fatal. The wounded man died in the hospital three days later.

The three bystanders who witnessed the encounter were unharmed.

Badly shaken, Bennett returned to the family trailer where his wife had already called the Sheriff's Department. Later in the evening, a Sheriff's deputy

questioned Bennett who admitted in a videotaped voluntary statement that he had fired the single shot out of anger and a desire to warn the other man away from his family.

Sadly, it transpired that Lance Russell, despite his unprovoked and threatening behavior earlier in the evening, was a 17-year old high school student from a well-to-do family. Russell apparently had mistaken Cindy Bennett and her car full of children for friends who had just played a Halloween prank on the Russell residence. He had embarked in a high speed game of chicken in an effort to retaliate for the prank.

Steve Bennett, on the other hand, was fully employed as a truck driver. His father was the pastor of a local rural church. Highly protective of his wife and two children, until this tragedy he had

lived a productive and blemish free adult life.

Faced with three prosecutors who insisted that the case was a death penalty case and confronted with a defense of involuntary manslaughter, the jury ultimately returned a compromise verdict of second-degree murder. Steve Bennett was then sentenced to 17 years in prison.

The Court of Criminal Appeals affirmed the judgment of conviction on June 7, 1990, and upheld the constitutionality of the Tennessee "Hired Gun" statute, T.C.A. § 8-7-401, both as written and applied.[3]

On October 15, 1990, the Tennessee Supreme Court denied Steven

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[3] *State v. Bennett*, C.C.A. Number 230 (Blount County) June 7, 1990; (copy attached at App. 32a).

Bennett's application for permission to appeal.

This petition follows as a question of first impression before this Court.

REASON FOR GRANTING THE WRIT

THE TENNESSEE "HIRED GUN" STATUTE WHICH PERMITS PRIVATE ATTORNEYS TO PARTICIPATE IN PUBLIC PROSECUTIONS VIOLATES BOTH THE DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE UNITED STATES CONSTITUTION.

I. Introduction -- The Origins of the Antiquated and Outdated Practice of Private Prosecution

A. The Medieval History of Private Prosecutions

The now unseemly practice of permitting private attorneys to help prosecute public offenses has its roots in

the ancient thickets of English common law.[4] In medieval times, the normal means of bringing criminals to justice in England was to allow the victim or the victim's family to institute criminal proceedings:

> The fact that the private vengeance of the person wronged by a crime was the principal source to which men trusted for the administration of criminal justice in early times is one of the most characteristic circumstances connected with English criminal law, and has had much to do with the development of what may perhaps be regarded as its principal distinctive peculiarity, namely, the degree to which a criminal trial resembles a private litigation.[5]

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[4] *See e.g.*, Comment, *The Outmoded Concept of Private Prosecution*, 25 Am.U.L.Rev. 754 (1976)(hereinafter *Comment*); Berg, *Criminal Procedure: France, England, and the United States*, 8 DePaul L.Rev. 256,257 (1959)(hereinafter, "Berg").

[5] Id. at 756, n.12, *quoting*, 1 J.Stephen, *A History of the Criminal Law of England* 245 (1883).

These English origins influenced early common law in British North America.[6] As summarized in *State v. Ray*:[7]

> At common law, criminal prosecutions were generally carried on by individuals interested in the punishment of the accused, and not by the public. The private prosecutor employed his own counsel, had the indictment founded and the case laid before the grand jury, and took charge of the trial before the petit jury. . . .[8]

Although still a vestige of law in several states,[9] the completely private prosecution of public offenses has become an anachronistic practice in this

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[6] *See generally*, Comment, at 765, n.73, and cases cited therein, all of which address this issue.

[7] 143 N.E.2d 484, 485 (Ohio App. 1956).

[8] Id.

[9] *See*, supra, note 6.

country,[10] and no longer exists in England, the land of its birth.[11]

During the past two hundred years, the United States has shifted from private to public prosecutions,[12] in a

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[10] The dearth of recent cases on this issue itself warrants such an inference. Indeed, the statute challenged in this petition, Tenn. Code Ann. § 8-7-401, has been discussed in but a single Tennessee opinion prior to this case. *See*, *State v. Voltz*, 626 S.W.2d 291 (Tenn.Crim.App. 1981).

[11] In Great Britain, the Director of Public Prosecutions directs felony criminal prosecution and has the exclusive right to select counsel to represent the crown. *See*, *Comment* at 756.

[12] In the United States, several states have condemned the private practice. *See, e.g.*, *State v. Harrington*, 534 S.W.2d 44 (Mo. 1976)(held unconstitutional); *McKay v. State*, 90 Neb. 63, 132 N.W. 741 (1911)(held unconstitutional); *Biemel v. State*, 37 N.W. 244-248 (Wis. 1888)(held unconstitutional); *Meister v. People*, 31 Mich. 99 (1875)(held unconstitutional); *Commonwealth v. Williams*, 56 Mass. (2 Cush) 582 (1849)(limited to "peculiar circumstances" or "some stringent reason"); *Born v. State*, 397 P.2d 924 (Okla.Crim.App. 1964)("frowned upon" by Court); *State v. Jensen*, 178 Iowa 1098, 160 N.W. 832 (1917)(prohibited where attorney involved in civil and criminal matters

(continued...)

fundamental change which predates the American Revolution.[13]

The modern system of public prosecutions ensures that officials are selected for the purpose of impartially prosecuting criminal acts, which by their very nature affect the general public and not just a specific individual.

Thus, in striking down the use of privately retained counsel in a criminal trial, the Wisconsin Supreme Court said:

> In an early day in England private parties prosecuted

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[12](...continued)
arising from some facts); *State v. Scott*, 72 Idaho 202, 239 P.2d 258 (1951)(prohibited if involved in civil and criminal matters); *Cantrell v. Commonwealth*, 229 Va. 387, 329 S.E.2d 22 (1985)(private prosecutors hired by family of murder victim held to violate due process under Virginia constitution).

[13] *See, 4 National Commission on Law Observation and Enforcement, Report on Prosecution 7 (Wickersham Commission 1931) (discussing the establishment of the Office of Attorney General in Virginia during the latter part of the seventeenth century).*

> criminal wrongs which they suffered. They obtained an indictment from a grand jury, and it became the duty and the privilege of the person injured to provide a prosecutor . . . to prosecute the indicted person. Our scheme of government has changed all this. It is . . . the better public policy to provide for the public prosecution of public wrongs without any interference on the part of private parties, although they may have been injured in a private capacity different from the general public injury that accrues to society when a crime is committed.[14]

The Court elaborated:

> [U]nder our system we have private prosecution for private wrongs and public prosecution for public wrongs. Our scheme contemplated that an impartial man selected by the electors of the county shall prosecute all criminal actions in the county unbiased by desires of the

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[14] *State v. Peterson*, 281 N.W. 367, 369 (Wis. 1920)(striking down the role of the private prosecutor in criminal prosecutions).

complaining witness or that of the defendant.[15]

Hence, the ancient practice of allowing private attorneys to participate in public prosecutions is the antithesis of the modern system of public prosecution.

What may have been acceptable hundreds of years ago to bring individuals to justice has been rendered obsolete by a system of criminal justice which now seeks to eliminate private passions and animosities by providing evenhanded prosecutions by public officials.

B. Ethical Considerations

The development of public prosecutions in our criminal justice system has precipitated recognition of the unique standards and duties that public prosecutors must uphold. In the landmark

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[15] Id. (emphasis added).

opinion of *Berger v. United States*,[16] this Court said:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape nor innocence suffer.[17]

This Court echoed Berger just three years ago when it noted the special duty of the public prosecutor as set forth in the Ethical Considerations and Standards published by the American Bar Association:

> This distinctive role of the prosecutor is expressed in Ethical Consideration (E.C) 7-13

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[16] 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

[17] *295 U.S. at 88 (emphasis added).*

> of Canon Seven of the American Bar Association (A.B.A.) Model Code of Professional Responsibility (1982): "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."[18]

Conversely, the responsibility of the private attorney is vastly different. Ethical Consideration 7-1 of Canon Seven contemplates that the zeal of the advocate is to be directed solely to the best interests and desires of his/her client, within the bounds of the law.

The incompatibility between the ethical responsibilities of a public prosecutor and those of a private attorney is self-evident.

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[18] *Young v. U.S. Ex Rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 107 S.Ct. 2124, 2135, 95 L.E.2d 740, 756 (1987) (emphasis added).

This Court has made it clear that the public prosecutor is cloaked with the unique and independent duty of his office which is to see that justice is done.

The private attorney, however, who is retained by a victim or the family of a victim and then cast in the role of prosecutor is inherently and fundamentally different. Once associated with the prosecutor's office, the attorney may ostensibly be bound by the same restrictions and duties; however, as a retained private lawyer, his zeal is to be directed to furthering the best interests of his client.

The term "private prosecutor" is thus, in reality, a contradiction in terms.

A private attorney has one obligation to his client, the public prosecutor has another to the public. The privately retained lawyer should never be

permitted to cloak his true private interests in the guise of the public prosecutor.

Each of the Courts which have rejected the practice of permitting privately retained attorneys to assist in public prosecutions have stressed this inevitable, untenable ethical conflict, as well as the unfairness that is brought to bear against a criminal defendant. In Nebraska, the Supreme Court has noted:

> [C]ounsel employed by outside parties, and, in the case of a homicide, by relatives of the deceased would not feel bound by [the public prosecutor's standards of conduct]. He appears as private counsel simply to represent the wishes, prejudices, and animosities of his clients; to secure a conviction at all hazards.[19]

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[19] *McKay v. State*, 90 Neb. 63, 132 N.W. 741 (1911) (emphasis added).

Likewise, the Wisconsin Supreme Court has expressed similar concerns:

> The prosecuting officer represents the public interest which can never be promoted by conviction of the innocent. His object, like that of the Court, should be simply justice; . . . [c]riminal cases are not likely to be so presented if the prosecution is permitted to be conducted by the paid attorneys of parties who from passion, prejudice, or even an honest belief in the guilt of the accused, are desirous of procuring his conviction.[20]

And in reversing a murder conviction because of the practice of allowing private prosecutors employed by private clients to participate in the public prosecution of a defendant, the Missouri Supreme Court reasoned:

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[20] *Biemel v. State*, 37 N.W. 244-248 (Wis. 1888) (emphasis added); *see also*, *State v. Scherr*, 101 N.W.2d 77 (Wis. 1960) (private prosecutors against public policy and impartial administration of criminal justice).

> The practice invites error from an excess of zeal which might well be avoided by leaving the conduct of criminal prosecution entirely in the hands of the elected official upon whom such duty has been placed.[21]

Hence, allowing attorneys to act as private prosecutors creates an inescapable ethical quandary in which the private attorneys must attempt to serve two masters, the interests of their client and the interests of the public.[22]

As at least three State courts have noted, such an attempt inevitably

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[21] *State v. Harrington*, 534 S.W.2d 44, 48 (Mo. 1976) (emphasis added).

[22] *See e.g.* A.B.A. Code of Professional Responsibility EC 5-14: Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse or otherwise discordant.

results in animosities and prejudices. That such differing interests -- and the unfairness that can result -- are so easily avoidable by simply relying upon properly elected public prosecutors to perform their duties underscores the antiquated and unnecessary nature of private prosecutions.

Quite simply, private participation in the prosecution of public offenses no longer has a place in the American system of criminal justice.

II. Tenn. Code Ann. § 8-7-401 violates fundamental notions of due process of law as afforded by the 14th Amendment to the United States Constitution.

A. As Written

A fundamental requirement of due process is that a criminal defendant receive a fair trial before a fair tribunal.[23]

In discussing the right to a fair trial, this Court has said:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . [T]o perform its high function in the best way, 'justice must

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[23] *Groppi v. Wisconsin*, 400 U.S. 505, 509 (1971); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *In re Murchison*, 349 U.S. 133, 136 (1955).

satisfy the appearance of justice.'[24]

The evil of the Tennessee Hired Gun statute is that it tips the due process scales to such a probability of unfairness that the "appearance of justice" is not satisfied.

Tennessee Code Annotated Section 8-7-401 provides in its entirety:

> "T.C.A. 8-7-401. Employment of private counsel by crime victim - Participation as co-counsel in prosecution of crime. A victim of crime or the family members of a victim of crime may employ private legal counsel to act as co-counsel with the district attorney general or his deputies in trying cases, with the extent of participation of such privately employed counsel being at the discretion of the district attorney general. The district attorney general or his deputy shall make the final and concluding argument. The privately retained counsel shall immediately inform the district attorney general of his

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[24] *In re Murchison*, 349 U.S. 133, 136 (1955), *quoting*, *Offut v. United States*, 348 U.S. 11, 14 (1954).

> employment. [Acts 1978, ch. 883 section 1; T.C.A. section 8-729.]" (emphasis added).

Thus the Tennessee statute by its express terms allows families of victims to retain private attorneys to act as "co-counsel" with the District Attorney in criminal prosecutions.

By the very use of the term "co-counsel", the Hired Gun Statute creates the inherent ethical conflict of interest noted by Courts in other states. In Tennessee the privately retained attorney must fulfill the duty of the public prosecutor while simultaneously serving only the interests of his client. The private lawyer serves as "co-counsel" to the District Attorney, thus implying he has the same ethical obligation to fulfill as does the District Attorney. Likewise, he appears in court as co-counsel to the District Attorney during trial.

Inevitably, however, the private "co-counsel" brings to the courtroom the passions, prejudices and/or animosities held by his client. If it were not so, the private lawyer would not be there in the first place. The private attorney is not in the courtroom to see justice done; he is there to obtain a conviction or a sentence on behalf of his client. No set of circumstances or pretenses can alter this undeniable fact or resolve this unresolvable conflict.

Moreover, on its face the statute permits both private and public counsel to appear before the jury in their respective capacities as lawyers for the victims of crime and lawyers for the people. No more chilling signal could be given to a jury that such a case is different and that the interests of the victim or his family

should be particularly taken into account in reaching a verdict.

Furthermore, the statute on its face contains so few restrictions on the role of the private co-counsel as to raise the appearance of impropriety. Once retained, the private lawyer simply gives notice to the District Attorney that he has entered the case. Thereafter, the private prosecutor may take the place of the public prosecutor in all aspects of trial except for the "final and concluding" argument.

While it is true the extent of participation of the private lawyer is ostensibly to be determined at the discretion of the District Attorney, the Supreme Court of Michigan saw through this pretense long ago and denounced it for the fiction it is:

> When counsel are introduced in a cause, and aid in the trial or argument, it is little short of absurd to suppose they can be

> prevented from having their own way. . . . We must look at things as how they exist; and everyone knows that if a prosecuting attorney allows the counsel of private parties to intervene, it must usually be for the reason that they will save him labor, and to assume the burden of prosecution.

Meister v. People, 31 Mich. 99, 105-106 (1875).

Thus, Tenn. Code Ann. § 8-7-401 provides a statutory mechanism which on its face creates a palpable conflict of interest, signals a jury that the desires of the victim or his family are particularly significant, and does so with little significant limitations on the role of the private lawyer.

The interjection of private attorneys and private resources into what is intended to be a public prosecution of a public wrong, warps the criminal process and infects the process with the

probability of unfairness that due process cannot tolerate.

Hence, the appearance of unfairness which accrues as a direct result of Tenn. Code Ann. § 8-7-401 is sufficient, under the decisions of this Court,[25] to warrant the protection of the 14th Amendment. Accordingly, the Tennessee Private Prosecution statute should be held unconstitutional on its face.

B. As Applied to the Instant Case

Assuming, arguendo, that Tenn. Code Ann. § 8-7-401 is not facially unconstitutional, the facts of the present case indicate that the participation of the private prosecutors was nonetheless unconstitutional.[26]

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[25] *In re Murchison*, *supra*.

[26] The following federal cases involving private prosecutors in analogous settings have addressed due process concerns as applied: *Ganger v. Peyton*, 379 F.2d 709 (continued...)

Prejudice arose prior to trial, then continued throughout as an inevitable consequence. The affluent family of the deceased retained their private attorneys to prevail upon the State prosecutors to seek the death penalty. Indeed, it was only after these attorneys intervened and pressed their client's demands that the district attorney general filed notice that

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[26](...continued)
(4th Cir. 1967)(participation of a private prosecutor who was also involved in a related civil matter invalidated a conviction for violation of fundamental fairness assured by due process clause); *Hughes v. Bowers*, 711 F.Supp. 1574 (N.D.Ga. 1989)(prosecution rendered fundamentally unfair by participation of special prosecutor retained by victim's family, where the attorney also represented the family in related insurance claim); *but see, Jones v. Richards*, 776 F.2d 1244 (4th Cir. 1985)(not a per se due process violation); *Slumbo v. Scabold*, 704 F.2d 910 (6th Cir. 1983)(no due process violation unless shown the attorney has ignored the interests of justice in securing a conviction); *State of N.J. v. Kinder*, 701 F.Supp. 486 (D.N.J. 1988)(no due process violation where private attorneys participate in prosecuting less serious crimes).

the prosecution would seek the death penalty on facts which were tragic but which clearly did not warrant such a momentous penalty under the facts adduced by the prosecution or the law of the State at the time.[27]

The decision to seek the death penalty on such meager evidence must be seen for what it was: a decision to permit

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[27] The applicable Tennessee law on the "aggravating" circumstance cited by the State did not fit the facts of the instant case, because the Tennessee Supreme Court has consistently interpreted Tenn. Code Ann. 39-2-203(i)(3) as requiring that a defendant shoot at, wound, or otherwise threaten other witnesses. *See e.g., State v. Cone*, 665 S.W.2d 87, 95 (Tenn.1984)("[c]ontemplates either multiple murders or threats to several persons at or shortly prior to or shortly after an act of murder."); *State v. Workman*, 667 S.W.2d 44 (Tenn. 1984) (defendant killed one officer, shot a second, and fired at a third); *State v. Johnson*, 632 S.W.2d 542 (Tenn. 1982)(three people shot inside a store and one killed, two more killed outside); *Cozzolini v. State*, 584 S.W.2d 765 (Tenn. 1979)(officer shot twice and killed, defendant exchanged shots with two others).

an affluent family using private prosecutors to dictate the ultimate objective of the State and to use the power of the public prosecutors as an instrument of private revenge.

That private parties could have such pervasive influence over what was intended to be a public prosecution is a reflection of the unfairness that later permeated the trial.

Acting within the ambit of the Tennessee statute, the aggrieved family of the deceased retained not one but two private lawyers to serve as co-counsel at the trial. Thus, throughout the trial, the prosecution team consisted of two private lawyers and a single assistant public prosecutor. In sheer terms of numbers, therefore, the private lawyers constituted two-thirds of the prosecution team in the courtroom, a fact which implicitly

continued to emphasize to the jury the predominate interests of the family of the deceased.

Indeed, both private lawyers participated actively in all phases of the ensuing trial.

During jury selection they both took special pains to emphasize to the jury their unique relationship to the mother of the deceased who was in the courtroom and who they introduced to the venire.

Both men also emphasized to the venire that the case was a death penalty case, although neither mentioned their own

role in the State's decision to seek the death penalty.[28]

One of the private lawyers delivered the opening statement on behalf of the prosecution while the other delivered part of the final argument at the end of the trial. Between the opening statements and final arguments both men called witnesses for the prosecution in its case in chief and cross-examined witnesses called by the defense.

In sum, the ostensible discretion of the District Attorney was used to permit the lawyers for the family of the deceased to participate in every phase of the trial.

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[28] Similarly, neither lawyer directly referred to his position of political leadership in the community. They did repeatedly refer to the fact that their office was located across the street from the Courthouse, an oblique reference perhaps to the fact that the two defense counsel, who had no political affiliations, were from in a different county.

Subjecting the petitioner to the combined resources of both private counsel and public prosecutors before a jury that had been told it was to consider imposing the most extreme and irreversible of all penalties,[29] did not "satisfy the appearance of justice" nor was it just.[30]

Other courts have expressed due process concerns about the actual use of private prosecutors independent of any

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[29] Indeed this Court has repeatedly stressed the extra safeguards and protection that must be afforded to a defendant that faces not only the loss of his liberty but also the very loss of his life. *See, e.g., Reid v. Convert*, 354 U.S. 1, 45 (1957) ("The taking of life is irrevocable, it is in capital cases that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights.") *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) ("There is no question that death as a punishment is unique in its severity and irrevocability. When a defendant's life is at stake, the Court has been particularly sensitive to insure that every procedural safeguard is observed.")

[30] *In re Murchison*, *supra*.

showing of actual prejudice. The Nebraska Supreme Court has stated:

> [I]t must appear to the mind at once, that the appointment of a partisan special prosecutor was not in the interest of the fair and impartial trial guaranteed by the Constitution.[31]

Similarly, in reversing a murder conviction, the Supreme Court of Missouri said:

> We believe and hold that the practice of allowing private prosecutors employed by private persons to participate in the prosecution of criminal defendants is inherently and fundamentally unfair and that it should not be permitted on retrial of this case or any case tried after publication of this opinion. . . .[32]

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[31] *Fledge v. State*, 93 Neb. 610, 142 N.W. 276 (1913).

[32] *State v. Harrington*, 534 S.W.2d 44, 48 (Mo. 1976) (emphasis added); *See also, State Ex. Rel O'brien v. Moreland*, 778 S.W. 2d 400, 406 (Mo. App. 1989)(citing *Harrington*).

This Court itself has raised similar concerns in an analogous case, *Young v. United States Ex Rel. Vuitton Et Fils S.A.*[33] That case involved the appointment of private counsel with a pecuniary interest in the outcome as private prosecutors in a contempt proceeding. The Court stated:

> Regardless of whether the appointment of private counsel in this case resulted in any prosecutorial impropriety (an issue on which we express no opinion), that appointment illustrates the potential for private interest to influence the discharge of public duty.[34]

The majority went on to conclude that appointing an interested prosecutor was an error so fundamental that it required reversal without regard to the particular circumstances. The Court stated

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[33] 481 U.S. 787 (1987).

[34] Id. at 805 (emphasis in original).

that such an appearance of impropriety "diminished faith in the fairness of the criminal justice system in general."[35]

The analogy to the instant case is apparent.[36] The dominant presence of two private prosecutors throughout the trial of the case created the improper appearance that the interests of the family

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[35] Id. at 811. For the same reason, the actual outcome in the present case is irrelevant. Whether the result was a death sentence or a conviction on a lesser offense, the process itself was flawed and seen to be flawed by the intrusive presence of private attorneys intent upon their client's goals. *See also, Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967)(conviction of lesser offense does not remove the harm done because "we do not know and cannot ascertain what would have happened if the prosecuting attorney had been free to exercise the fair discretion which he owes to all persons charged with crime in his court.")

[36] Indeed, while the majority opinion in *Young* relies in part upon the supervisory authority held by federal courts, the due process undertones of the result reached were expressly emphasized in Justice Blackmun's concurring opinion. Id. at 2141.

of the deceased in this particular case were preeminent and that the jury should take into account the feelings of that family in reaching its verdict.

While every family who suffers a tragic loss has an understandable and human interest in the outcome of the litigation which arises from it, it is wrong to permit this interest to appear to influence the outcome of that litigation. Regardless of whether any actual prosecutorial impropriety existed (an issue which is not raised in this petition) the emphasis on the interests of the family of the deceased inevitably warp the appearance of fairness in any trial when a private lawyer appears. Such an appearance is worsened when not one but two private counsel appear and continue to pursue their quarry from all vantage points of the terrain which the criminal trial process affords.

If the character of the deceased is not properly at issue in a murder trial, the implied desires of the deceased's family seem even more remote and prejudicial to the fairness of the outcome.[37]

Hence, even if Tenn. Code Ann. § 8-7-401 is not unconstitutional as written, Steven Bennett was nonetheless denied his due process right to a fair trial by virtue of the very appearance of two lawyers who were there to emphasize the special desires of the aggrieved family.

III. Tenn. Code Ann. § 8-7-401 As Applied to the Instant Case Violated Fundamental Notions of Equal Protection As Afforded by the 14th Amendment to the United States Constitution

Steven Bennett was a man of limited means with an eighth grade

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[37] *See, South Carolina v. Gathers*, ____ U.S. _____, 109 S.Ct. 2207 (1989); *Booth v. Maryland*, 482 U.S. 496 (1987).

education. A truck driver, he lived with his wife, Cindy, and their two young children in a modest trailer in Blount County, Tennessee.

The tragic chain of events that transpired on October 31, 1987, had devastating consequences on his life and his family. Nonetheless, he stood ready to come before the jury and explain his actions. He asked only that he receive the same treatment as any other citizen accused of a crime.

He didn't get it.

Instead, as a direct result of Tenn. Code Ann. § 8-7-401, Steven Bennett received a death penalty trial with the interjection of not one but <u>two</u> private prosecutors, who were present before the jury for the explicit purpose of representing the desires of the family of the deceased to see him put to death.

Singling Steven Bennett out of a class of similarly situated defendants as one who had to defend himself against the combined resources of both the State and an affluent private family, violated fundamental notions of equal protection of the laws as embodied in the 14th Amendment to the United States Constitution.

In an analogous case concerning the equal protection rights of indigent criminal defendants, this Court in *Griffin v. Illinois*,[38] aptly stated that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[39]

This case raises the specter of injustice in two respects.

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[38] 351 U.S. 12 (1956).

[39] Id. at 19.

First, as a corollary to Griffin, there can be no equal justice where the kind of trial a man gets depends on the amount of money a private party has. The procedure permitted by Tenn. Code Ann. § 8-7-401 suggests that well-to-do citizens who can afford private prosecutors have greater rights of access and greater rights of argument in a public criminal trial in the State of Tennessee than do less well endowed citizens.[40]

Second, the accused, in a case where private prosecutors have been retained, will never have commensurate resources with which to resist the combined resources of both the state and the interested parties who have placed their private resources at the state's disposal.

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[40] It goes without saying only well-to-do Tennesseans could afford the luxury of hiring their own "private" prosecutors.

Citizens like Steven Bennett are therefore unfairly and impermissibly singled out from similarly situated defendants for just such joint public/private prosecutions. While most who stand accused in Tennessee are prosecuted solely by the State, the unlucky few must run a gauntlet that is unfairly lengthened just where it grows most hazardous by private floggers intent upon a private retribution. Few men of modest means could emerge unscathed. Steve Bennett didn't. Thus, Tenn. Code Ann. § 8-7-401 creates discordant treatment of similarly situated citizens and the same type of evils feared in Griffin.

These inherent vices result in a denial of equal protection without offering any compensating virtues. Indeed there is simply no compelling or even rational

interest to be achieved in permitting such an antiquated practice.

The Tennessee Legislature has provided for a qualified staff of public prosecutors[41] who are clearly able to handle even the most complex cases with competence.

These public attorneys are paid from public funds to avoid the obvious hazards of conflicting interests and/or divided loyalties.[42]

Additionally, the Tennessee legislature has provided a system with which to replace or supplement a prosecution with additional publicly chosen

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[41] Tenn. Code Ann. § 8-7-102 and 8-7-103.

[42] Tenn. Code. Ann. § 8-7-105.

and impartial attorneys should the need ever arise.[43]

In the instant case, experienced and competent public prosecutors had obtained a first degree murder indictment and were expeditiously proceeding to trial. There was no danger that any public wrong committed by Steven Bennett would go unaddressed by the State. Yet, a family of means desired to purchase its own brand of justice and to seek the punishment they deemed appropriate.

The outmoded and unnecessary nature of the Tennessee Hired Gun statute permitted them to do so. By singling out a single criminal defendant for disparate treatment without offering in return any justifiable state interest, Tenn. Code Ann. § 8-7-401 violated fundamental notions of

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[43] Tenn. Code Ann. § 8-7-106 and 8-7-107.

equal protection of the laws as afforded by the 14th Amendment.

IV. Conclusion

The petitioner was convicted of murder in the second degree following a criminal trial in which a Tennessee statute permitted the passions, prejudices and concerns of private parties to pervade the courtroom and the trial which led to his conviction.

For all the reasons stated herein, Steven Bennett was denied his rights under the United States Constitution. He thus respectfully requests that this Court grant this petition for a writ of certiorari and in due course eliminate from modern American jurisprudence this unseemly and unfair relic from the English medieval past.

Respectfully submitted,

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IN THE CRIMINAL COURT FOR
BLOUNT COUNTY, TENNESSEE
DIVISION II

STATE OF TENNESSEE	)	
	:	
	)	
v.	:	NO. C-3732
	)	
	:	
STEVEN BENNETT	)	

MOTION TO CHALLENGE THE CONSTITUTIONALITY AND LAWFULNESS OF PERMITTING PRIVATE PARTIES TO RETAIN WELL-KNOWN PRIVATE COUNSEL TO PROSECUTE PUBLIC OFFENSES IN A HIGHLY PUBLICIZED CASE IN WHICH DULY ELECTED PUBLIC OFFICIALS ARE FULLY COMPETENT TO DISCHARGE THE DUTIES OF THEIR OFFICE

Steve Bennett moves this Honorable Court for an Order holding that the participation of private lawyers in the prosecution of this case is unconstitutional, illegal, and unwise.

STATEMENT OF FACTS

Steve Bennett, a truck driver with an eighth grade education, is to be prosecuted for murder by a team of at least two highly experienced public prosecutors and two well-known private prosecutors.

These prosecutors include the following:

(1) Attorney General David Ballard, a well-known, justly respected and experienced prosecutor who has served in his public position for approximately ten years;

(2) Steve Hawkins, Mr. Ballard's highly regarded Assistant District Attorney;

(3) Mr. Jerry Cunningham, the chairman of the Republican party for Blount County and a seasoned, extremely capable, attorney hired by the family of Lance Russell to help seek the death penalty;

(4) Kelly Thomas, Mr. Cunningham's active and able law partner, who is a leader in the Democratic party in Blount County and who serves on the state executive of the Democratic party for the state of Tennessee.

Private counsel have been retained to help seek the death penalty pursuant to Tennessee Code Annotated § 8-7-401 which purports to permit the family members of a victim of crime to employ private, legal counsel to act as co-counsel under the direction of the District Attorney General in the prosecution of public offenses.

The combination of two public and two private prosecutors seeking the death of an unlettered, father of two, living in modest circumstances, offends elementary notions of due process guaranteed by both the Fifth and Fourteenth Amendments to the Federal Constitution and Article 1, Section 8 of the Tennessee Constitution.

CONCLUSIONS OF LAW

The right of the accused in a criminal case to have a trial conducted in accordance with ordered notions of due

process is fundamental to both our state and federal constitution.

Any statute which transgresses the requirements of due process is unconstitutional.

Where as here, a statute purports to permit the public officials of this state to be reinforced by the best known private counsel in the jurisdiction, any citizen accused of crime faces a nearly insurmountable combination of both public and private resources dedicated to the termination of his liberty or, as in this case, his life.

Such a joint prosecution is inherently unfair and transgresses the due process clauses of both state and federal constitutions as well as the equal protection clause of the Fourteenth Amendment.

Statutes similar to T.C.A. § 8-7-401 have been roundly and justifiably criticized by other states on the grounds that they offend due process.

The Supreme Court of Missouri, sitting en banc, in 1976 reversed a murder conviction in part because the practice of allowing private prosecutors, employed by private persons, to participate in the prosecution of criminal defendants was inherently and fundamentally unfair. State v. Harrington, 534 S.W.2d 44 (Mo. 1976).

In a per curiam opinion, the Supreme Court observed:

> The practice invites error from an excess of zeal which might well be avoided by leaving the conduct of a criminal prosecution entirely in the hands of the elected official upon whom such duty has been placed.
>
> We believe, and hold, that the practice of allowing private prosecutors, employed by private persons, to participate in the prosecution of criminal defendants, is inherently and

> fundamentally unfair, and that it should not be permitted on retrial of this case or in any case tried after publication of this opinion in the Southwestern Reporter.

Id. at 48.

The Supreme Court of Wisconsin has likewise refused to permit the private assistance of private counsel in criminal cases pointing out:

> The prosecuting officer represents the public interests, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice; and he has no right to sacrifice this to the pride of professional success . . . criminal cases are not likely to be so presented if the prosecution is permitted to be conducted by the paid attorneys of parties who from passion, prejudice, or even an honest belief in the guilt of the accused, are desirous of procuring his conviction.

Biemel v. State, 37 N.W.2d 244, 245-48 (Wis. 1888) (emphasis added).

This widely reported case presents precisely those elements which the Wisconsin court criticized. Whether from passion, prejudice or an honest belief in the guilt of the accused, a family of means has retained distinguished private counsel to help secure the kind of conviction they deem appropriate on the facts as they believe them to be. Private counsel are understandably intent upon procuring the conviction and execution of the accused because that is the desire of their private clients.

The Wisconsin Supreme Court has pointed out the fallacy in permitting this kind of representation in a criminal case:

> In an early day in England private parties prosecuted criminal wrongs which they suffered. They obtained an indictment from a grand jury, and it became the duty and the privilege of the person injured to provide a prosecutor at his own expense to prosecute the indicted person. Our scheme of

> government has changed all this. It is now deemed the better public policy to provide for the public prosecution of public wrongs without any interference on the part of private parties, although they may have been injured in a private capacity different from the general public injury that accrues to society when a crime is committed. So under our system we have private prosecution for private wrongs and public prosecution for public wrongs. Our scheme contemplates that an impartial man selected by the electors of the county shall prosecute all criminal actions in the county unbiased by desires of complaining witnesses or that of the defendant.

State v. Peterson, 218 N.W. 367, 369 (Wis. 1928)(striking down the role of the private prosecutor in criminal prosecutions in that case) (emphasis added).

In the present case the State belatedly seeks the death penalty on facts which do not appear to warrant such a punishment at least in part because the family of the deceased want Steve Bennett executed. This practice of mixing public

and private motives by means of public and privately retained counsel has been justly criticized on the grounds that the responsibility of a public prosecutor differs from that of the usual private advocate and that the appearance of a conflict of interest would bar such mixed responsibilities. Harrington at 50; see Code of Professional Responsibility, D.R. 7-101 (representing a client zealously); D.R. 7-103 (performing the duty of public prosecutor other government lawyer) and E.C. 9-2 ("when explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession").

The use of private prosecutors in a death penalty prosecution in the state of

Tennessee raises the specter of all these vices with no compensating virtues.

In the present case, the public prosecutors are well known and highly regarded as competent, vigilant, and impartial servants of the public good. They do not require nor have they solicited the intervention of private counsel acting on behalf of private parties with private interests.

The use of private prosecutors in these circumstances suggest that well-to-do citizens who can afford "private prosecutors" may have greater rights of access and greater rights of argument in the public criminal trial of a well publicized case in the state of Tennessee than do less well endowed citizens.

The corollary is that the accused in a case such as this may not have commensurate resources with which to resist

the combined resources of both the State and the interested private parties who place their resources at the State's disposal. Worst of all, citizens like Steven Bennett are unfairly and impermissibly singled out from other defendants in similar cases for such joint public/private prosecutions.

In each of these respects, therefore, the statute and its application denies Steve Bennett his right to due process and equal protection of the laws as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 8 of the Tennessee Constitution.

REQUEST FOR RELIEF

The accused, Steve Bennett, therefore prays this Honorable Court to:

(1) Allow the accused to present evidence on this motion.

(2) Recuse the two distinguished private counsel from the trial of this case on the grounds that the participation of these two particular counsel in the trial of this particular case in this particular county constitutes denial of due process and equal protection.

(3) Order the exclusion of all private counsel from the continued prosecution of this case on the grounds that T.C.A. § 8-7-401 violates fundamental notions of due process and equal protection embodied in both the State and Federal Constitution.

(4) Grant such other and further relief that is appropriate considering the circumstances.

(5) In the event the Court declines to grant the accused relief from his continued prosecution by private counsel, the accused respectfully petitions

the Court for the privilege of raising this issue before the Court of Criminal Appeals on an interlocutory appeal pursuant to Rule 9(b) of the Rules of Appellate Procedure on the grounds that review upon entry of final judgment will be ineffective and the need to prevent irreparable injury by the continued prosecution of this case by private prosecutors is great. In so moving Steve Bennett notes that no reported case appears to have challenged the constitutionality of the statute in question since its passage in 1978. See State v. Voltz, 626 S.W.2d 291 (Ct.Cr.App. 1981).

IN THE CIRCUIT COURT OF
BLOUNT COUNTY, TENNESSEE

DIVISION II

STATE OF TENNESSEE	)	
VS.	)	CASE. NO. C-3732
STEVE BENNETT	)	
	)	
STATE OF TENNESSEE	)	
VS.	)	CASE NO. C-3733
DAVID ADAMS	)	

These Motions Regarding Private Prosecutors came on to be held on the 29th day of April, 1988, before the Honorable John Crawford, Judge, holding the Circuit Court for Blount County, at Maryville, Tennessee, and the folloiwng proceedings were had, to-wit:

* * * * * *

A I believe Mr. Fels' question more accurately set that out.

Q Okay. You're -- have you been retained on behalf of the family?

A We've been requested to assist in the prosecution by the family and said we would.

Q All right. Is there an attorney client relationship between your firm and the family?

A I believe there is.

Q And as a part of that attorney client relationship have you been requested and is it a part of your job as you understand that attorney client relationship to seek and secure a conviction in these two cases?

A Our job is to help the Attorney General prosecute this case and at this point that is to get a conviction.

Q And that's what you've been asked to do?

A That's what we've been asked to do, is to help the Attorney General.

Q Have you been asked to seek a conviction?

A Yes, assuming the case goes to trial.

MR. BLACK: All right. That's all.

MR. HAWKINS: I have no questions.

THE COURT: You may step down, Mr. Thomas. Call you next witness.

MR. FELS: That would conclude our proof in this regard, Your Honor.

THE COURT: Very well. You may present further argument.

MR. FELS: Thank you, Your Honor. Your Honor, the thrust of this argument is not so much the Constitutionality of the statute itself, although we have grave questions about that. It is not so much the question as to when by terms of the statute an individual becomes a victim of

crime and can retain private counsel, although we have concerns about that, but the thrust of this motion is rooted in due process and equal protection and has to do so with fundamental fairness in a death penalty case. In sum, Your Honor, four highly seasoned prosecuting counsel seek the death of a truck driver with an eighth grade education. I would not for a moment afford any man the opportunity to represent my client. And if Your Honor says that this is to be four against one, I shall do my steadfast best to represent the interest of Steve Bennett. But in many respects, Your Honor, given the wealth and talent I see across from this Courtroom, I'm reminded of shooting fish in a barrel, except that in this case there's only one fish, it's a small barrell, [sic] and there are four people that are taking aim at it. Fundamentally, Your Honor, it's not fair,

it's not right for some individual Defendants in our system to be singled out for this extra special attention. If it were right this law would permit families of substance or means, I'm not saying that's the case in this case, but it would permit families of substance or means who feel outrage, understandably, to retain the most famous, the most competent private counsel in their jurisdiction to assist already highly experienced, well respected, public prosecutors. And the difficulty with that is that private motives for the prosecution can become inextricably intertwined with public motivation for a public prosecution. Whether that happened or not in this case is not for us to say. I have the highest respect for the four individuals who are across the Courtroom from me. And I am confident that if anyone would try to avoid that intermixture it is

Mr. Ballard, Mr. Hawkins, Mr. Cunningham, and Mr. Thomas. But inevitably when lawyers are retained to seek the death penalty or to seek conviction, their interest on behalf of their private clients are inevitably different than the interest of the public official that is elected to apply the laws fairly and impartially, and certain states have so found. Wisconsin has struck down a similar provision. Missouri has struck down a similar provision. In murder cases, Your Honor, in which the verdict came back guilty the Supreme Courts in those states reversed on the gounds [sic] that this kind of combination is really just unfair. The words of those Courts have already been cited to Your Honor and I need not dwell upon them. But it is essentially that to the effect that public wrongs should be prosecuted by public officials, private

wrongs by private parties. In this particular case if we proceed in this fashion we'll be voir direing the jury that may well be known to the chairman of the Republican Party, to a leading member of the Democratic Party, in a county with a relatively small population, with a -- as we understand it, total electoral roll of some thirty-nine thousand people, many of whom who participate in public electoins [sic] and might well be known to these fine attorneys. We think this is a dangerous practice. It's loading the odds. It's not fair to do it and it's unnecessary to do it. And rather than have the Supreme Court or any Court have to review this down the line, the appropriate thing is to head it off here and now. And we respectfully request the Court to do so on behalf of these individuals who face trial at the hands of the State.

THE COURT: Mr. Black.

MR. BLACK: Nothing further, Your Honor.

THE COURT: General, what do you say for the State?

MR. HAWKINS: If the Court please, we can certainly take time to talk about Mr. Fels and Mr. Black. The Court, I known, is well aware of the ability of Mr. Black. He is a fine trial attorney and one of the best in this part of the State or this part of the Country. The Court is well aware -- Mr. Black being in this county and having represented many, many criminal Defendants. And Mr. Fels -- I appreciate the comments Mr. Fels had about us, but Mr. Fels does not have to take a back seat to anyone. Mr. Fels for many, many years, as the Court may be aware, was the Assistant U.S. Attorney. He handled all types of criminal prosecutions. He is

the one who is most closely associated with prosecuting in this part of Tennessee many sheriffs, many high officials of government who were involved in corruption and the dealing of drugs, and one of the finest and best prosecutors that I've ever had the pleasure of knowing. And he also is one of the best and efficient defense attorneys it's been my pleasure to know. Mr. Fels should not and will not, and of course during these proceedings and during the trial, take a back seat to anyone. And I noticed these two fine attorneys here, and they also earlier today had their private investigator with them. This isn't going to be a contest of four lawyers against one, or four lawyers against two, or as Mr. Fels puts it, a shooting fish in a barrel. This will be a case where I am sure on behalf of the Defendants all the material facts on their side will come out, all of

the witnesses that could have been called will be called, all of the experts will analyze the evidence that in their opinion should analyze the evidence. Let me go further with regard to this, as the evidence before the Court is that Mr. Cunningham and Mr. Thomas have been asked to assist in the prosecution and they have done so by the statute that the Tennessee Legislature has passed. They serve at the discretion of the District Attorney. And as by the tactics; the matters of investigation, the matters of Rule 16 Discovery, and all the rules that pertain to handling this Defendant in a fair and non-prejudicial manner, and keeping with the Constitution of Tennessee, rest on the shoulders of the District Attorney General's Office. That's the way it has been up to the point and that's the way it has been through the -- and that's the way

it will be through the trial. Mr. Cunningham -- we're glad to have Mr. Cunningham and Mr. Thomas assisting us as means of that statute. We believe the statute is Constitutional. As this Court well knows even before this statute was passed, at least in this jurisdiction, private prosecutors have been allowed for years and years. The Court may be more aware of that than I. But for years and years even before we had this particular statute, private prosecutors were allowed to help and assist the District Attorney General's Office. We believe the statute is Constitutional. That the rights of this Defendant will be protected by the Court, by his lawyers and in keeping with the prosecutorial standards of the District Attorney General's Office and by those standards which have been announced

previously. We ask the Court to overrule the motion.

THE COURT: Now, let me be sure -- Mr. Fels, you have covered all three motions in your opening argument?

MR. FELS: Yes, Thank you, Your Honor.

THE COURT: Do you have any closing argument to make in the matter?

MR. FELS: Nothing further. Thank you, Your Honor.

THE COURT: Prior to the 1978 statute it was certainly a custom in this part of Tennessee for private citizens to employ a private attorney to prosecute criminal matters. And sometimes the District Attorney or one of his Assistants in fact participated in that prosecution in the Courtroom and sometimes they did not, depending on the office and the jurisdiction of the particular case. Of

course history does not overcome a Constitutional defect, if there be one. In 1978 the Legislature enacted the following: "A victim of a crime or the family members of a victim of crime may employ private counsel to act as co-counsel with the District Attorney General or his deputies in trying cases with the extent of participation of such privately employed counsel being at the discretion of the District Attorney General. The District Attorney General or his deputy shall make the final and concluding argument. The privately retained counsel shall immediately inform the District Attorney General of his employment." Now, a number of argument have been made as to the unconstitutionality or impropriety of having private counsel in this case, one of them the Court notes with interest is that a jury may perceive a greater number and

possibly an enlarged quality in the prosecution. That may or may not be so. The Court does not believe that that is a matter that rises to a Constitutional level. It has been perceived by attorneys in both criminal and civil matters that sometimes it is to the detriment of a party to have too much counsel in appearance and sitting on one side of the Courtroom because it will have the exact opposite effect of giving the other side the appearance of the underdog, and therefore have the sympathy of the jury that is trying the case. I can remember that being discussed in a number of cases, and although a lawyer might like to take his usual place on one side of the Courtroom, he was instructed not to, so that there would not be -- appear to be too much manpower on one side of the Courtroom. But it appears at this point that General

Ballard and General Hawkins and Mr. Cunningham and Mr. Thomas will be here in this case. The Court does not find that the three motions have merit and overrules them at this time. The Court also observes that Mr. Fels is probably correct that it will be more difficult to select a jury because there will be many more people who know Mr. Thomas and Mr. Cunningham in one way or another, and will increase the probability that there may be challenges for cause with a larger number of the prospective veniremen, but the Court doesn't believe that it can overrule the Legislature on the basis of that increased difficulty for the Court in getting the matter quickly to trial. Now, gentlemen, I believe this brings us to the Motion for Change of Venue. And in that regard, Mr. Black, are you also asking for a change of venue?

MR. BLACK: Yes, Your Honor.

THE COURT: Very well. Let me ask you -- you do intend to offer evidence in this Motion.?

MR. FELS: Yes, Your Honor. I have two brief witnesses and I have an affidavit to submit to the Court.

THE COURT: I was going to ask by what means -- you have two witnesses?

MR. FELS: Two witnesses and an affidavit. Thank you, your Honor.

THE COURT: Very well. If you will call your first witness.

MR. FELS: Thank you. Mr. A. J. Bennett.

IN THE CIRCUIT COURT
OF BLOUNT COUNTY, TENNESSEE

DIVISION II

STATE OF TENNESSEE	)	
	)	
vs.	)	NO. C-3732
	)	
STEVEN BENNETT	)	

ORDER

It appearing that the order entered in this case on 9 May 1988 regarding a Rule 9 Interlocutory Appeal contains a clerical error of great significance; it is hereby ordered that the second paragraph of the order be stricken and the following substituted in its place:

"Upon consideration of the merits of this matter, the Court finds that an Interlocutory Appeal should not be permitted regarding these matters. The

Clerk shall furnish a copy of this order to all counsel."

The Clerk shall upon receipt of this executed order immediately advise all counsel of it by telephone or other equally expeditious means.

This the 18th day of May, 1988.

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/s/
JUDGE

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1989 SESSION

STATE OF TENNESSEE,	)	
	)	C.C.A. No. 230
Appellee,	)	
	)	BLOUNT COUNTY
vs.	)	
	)	John Crawford, Judge
STEVEN BENNETT,	)	
	)	(Murder 2nd Degree)
Appellant.	)	

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OPINION FILED: JUN 7 1990

AFFIRMED

Joe B. Jones, Judge

O P I N I O N

The appellant, Steve Bennett, was convicted of murder in the second degree by a jury of his peers. The trial judge, finding the appellant to be a standard offender, imposed Range I sentence of twelve (12) years in the Department of Correction. Since the appellant used a firearm in the commission of the offense, the trial judge imposed an additional sentence of five (5) years. These sentences are to be served consecutively. The effective sentence imposed by the trial

judge is seventeen (17) years in the Department of Correction.

The appellant appealed as of right to this Court following the denial of his motion for a new trial. Tenn. R. App. P. 3(b).

* * * * * * *

CONSTITUTIONALITY OF STATUTE PERMITTING THE USE OF PRIVATE PROSECUTORS IN CRIMINAL PROCEEDINGS

The victim's family employed two attorneys to serve as private prosecutors. One of the attorneys was active in the Blount County Democratic Party. The other attorney was active in the Blount County Republican Party. Both had served as county chairman for their respective parties. The attorneys actively participated in all phases of the prosecution against the appellant.

The appellant vigorously opposed the right of the private prosecutors to

participate in the trial on the merits. He filed a pretrial motion challenging their right to participate in the prosecution on constitutional grounds. The trial judge denied the motion. He subsequently appealed by permission to this Court pursuant to Rule 9, Tenn. R. App. P. The appellant's application was denied. Thereafter, the appellant sought permission to appeal the issue to the Tennessee Supreme Court pursuant to Rule 10, Tenn. R. App. P. The Supreme Court denied the appellant's application on the ground that the issue had become moot.

In this Court the appellant contends that the statute permitting the utilization of private prosecutors violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and the Law of the Land Clause contained in Article I,

Section 8 of the Tennessee Constitution. He further contends that the statute is unconstitutional in the manner in which it was applied in this case.

Prior to 1978, the common law of this State recognized the right of a victim, or the family of a deceased victim, to employ private counsel to assist the district attorney general, or his assistant, in the prosecution of the person who committed the offense against the victim. In 1978 the Tennessee General Assembly enacted a statute which recognizes the right of a victim to employ private counsel to assist in the prosecution of the accused. This statute[1] provides:

> A victim of crime or the family members of a victim of crime may employ private legal counsel to act as co-counsel with the district attorney general or his deputies in trying cases, with the extent of participation of

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[1] Tenn. Code Ann. § 8-7-401.

> such privately employed counsel being at the discretion of the district attorney general. The district attorney general or his deputys shall make the final and concluding argument.

Contrary to the appellant's contention, the practice of permitting a privately retained prosecutor to assist a district attorney general, or his assistant, does not violate the Fourteenth Amendment to the United States Constitution or the Law of the Land provision contained in Article I, Section 8 of the Tennessee Constitution.[2] Consequently, Tenn. Code Ann. § 8-7-401 is constitutional.

Our review of the record does not reveal that the application of this statute in the case sub judice resulted in a

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[2] Jones v. Richards, 776 F.2d 1244, 1247 (4th Cir. 1985); Powers v. Hauck, 399 F.2d 322, 325 (5th Cir. 1968); Stumbo v. Seabold, 704 F.2d 910, 911 (6th Cir. 1983); Commonwealth v. Hubbard, 777 S.W.2d 882, 883 (Ky. 1989).

depravation of a constitutional right. The private prosecutors did not engage in prosecutorial misconduct.[3] Nor does the record reflect that the private prosecutors represented the family of the victim in a civil case arising out of the occurrence which gave rise to the criminal prosecution.[4] Also, this was not a contempt proceeding which arose out of a civil prosecution.[5]

The district attorney general maintained control over the prosecution as required by out statute.

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[3] See Stumbo v. Seabold, supra; Thomas v. State, 59 So.2d 517 (1952) (private prosecutor was over-zealous in the prosection of the accused).

[4] See Cantrell v. Commonwealth, 329 S.E.2d 22 (Va. 1985); Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967). See Jones v. Richards, supra.

[5] See Kearns v. Wolverton, 381 S.E.2d 258 (W.Va. 1989); State ex rel. Coppers v. Intern. Union, 298 S.E.2d 827 (W.Va 1982).

The appellant's complaint that a private prosecutor was permitted to argue during summation to the jury is likewise without merit. The statute does not prohibit a private prosecutor from making the opening argument to the jury. Only the rebuttal, or last argument, must be made by the district attorney general or his assistant.

This issue is without merit.

* * * * * *

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

STEVEN BENNETT,	)	
	)	
Appellant	)	
	)	
	)	
VS.	)	BLOUNT COUNTY
	)	C.C.A. NO. 230
	)	
STATE OF TENNESSEE,	)	
	)	
Appellee.	)	

ORDER

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion the application should be denied.

PER CURIAM

Reid, C. J. (not participating)

Tennessee Code Annotated Section 8-7-401 provides in its entirety:

> "T.C.A. 8-7-401. Employment of private counsel by crime victim - Participation as co-counsel in prosecution of crime. A victim of crime or the family members of a victim of crime may employ private legal counsel to act as co-counsel with the district attorney general or his deputies in trying cases, with the extent of participation of such privately employed counsel being at the discretion of the district attorney general. The district attorney general or his deputy shall make the final and concluding argument. The privately retained counsel shall immediately inform the district attorney general of his employment. [Acts 1978, ch. 883 section 1; T.C.A. section 8-729.]" (emphasis added)

AMENDMENT XIV (1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
APR 15 1991
OFFICE OF THE CLERK

(2)

No. 90-1139

In The

Supreme Court of the United States

October Term, 1990

STEVEN BENNETT,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Tennessee violates the due process and equal protection clauses of the Constitution by permitting private counsel to assist in criminal prosecutions under the direction and control of public prosecutors.

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No. 90-1139

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STEVEN BENNETT,

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Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The respondent, the State of Tennessee, respectfully submits this response to the petition for writ of certiorari by the petitioner, Steven Bennett.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Tennessee is attached to the petition as an appendix and

has been published. *State v. Bennett*, 798 S.W.2d 783 (Tenn. Crim. App. 1990).

JURISDICTION

The judgment of the Court of Criminal Appeals of Tennessee was entered on June 7, 1990. On October 15, 1990, the Supreme Court of Tennessee denied the petitioner's application for permission to appeal.

The petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

The petitioner, Steven Bennett, was convicted by a jury of murder in the second degree by use of a firearm. The trial court subsequently conducted a sentencing hearing and sentenced the petitioner to seventeen (17) years imprisonment.

The petitioner appealed to the Court of Criminal Appeals of Tennessee, which affirmed the conviction and sentence on June 7, 1990. The petitioner filed a timely application for permission to appeal, which was denied by the Supreme Court of Tennessee on October 15, 1990.

ARGUMENT

THE DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE CONSTITUTION PERMIT PRIVATE COUNSEL TO PARTICIPATE IN CRIMINAL PROSECUTIONS UNDER THE DIRECTION AND CONTROL OF PUBLIC PROSECUTORS.

The petitioner asserts that Tenn. Code Ann. § 8-7-401 is facially invalid under the due process clause and violates equal protection as applied to the petitioner. The respondent submits that the statute is constitutional on its face and that the record fails to support the petitioner's contention that it was unconstitutionally applied in his case.

Tenn. Code Ann. § 8-7-401 provides as follows:

> A victim of crime or the family members of a victim of crime may employ private legal counsel to act as co-counsel with the district attorney general or his deputies in trying cases with the extent of participation of such privately-employed counsel being at the discretion of the district attorney general. The district attorney general or his deputy shall make the final and concluding argument. The privately-retained counsel shall immediately inform the district attorney general of his employment.

In the petitioner's trial, two private attorneys participated in the prosecution under the direction and control of Assistant District Attorney Steven Hawkins.

Before trial, the petitioner requested a stipulation regarding the control of the prosecution. The assistant district attorney refused to stipulate that any control had been relinquished and asserted that his office decided all issues regarding the case. The private attorneys who

assisted the prosecutor testified to this effect. This assistant district attorney affirmed on the record that his office made all decisions in a fair and non-prejudicial manner and expected to continue doing so throughout the trial. There has been no showing that the district attorney general would have handled the case any differently if the victim's family had made their wishes known personally or through others not involved in the prosecution.

There is no federal authority for the proposition that private participation in criminal prosecution is unconstitutional *per se*. This Court has approved the authority of federal courts to appoint private attorneys to prosecute criminal contempt actions, so long as private counsel is as disinterested as the public prosecutor. *Young v. U.S. ex rel. Vuiiton et Fils S.A.*, 481 U.S. 787, 804 (1987). Other federal courts have held that state laws providing for privately-retained counsel to assist prosecutors in criminal cases do not violate the defendant's constitutional rights. *See, e.g., Jones v. Richard*, 776 F.2d 1244 (4th Cir. 1985); *Stumbo v. Seabold*, 704 F.2d 910 (6th Cir. 1983); *Woods v. Linahan*, 648 F.2d 973 (5th Cir. 1983).

In *Stumbo, supra*, the Court upheld the Kentucky private prosecutors statute since it required the public prosecutor to retain control over the conduct of trial. 704 F.2d at 911. Absent evidence that the private prosecutor had ignored the interest of justice in favor of seeking a conviction, there is no *per se* constitutional violation. The Court reversed the conviction in that case, however, because the private prosecutor violated the standards of conduct required of all prosecutors. *Id.* at 911-12. In the instant case, private counsel conducted themselves in the manner required of all prosecutors.

When the proof shows that the prosecutors use their position for improper purposes, the resulting conviction may be set aside. In *Ganger v. Payton*, 379 F.2d 709 (4th Cir. 1967), a public prosecutor represented the petitioner's wife in a divorce action while prosecuting him for assaulting his wife. 379 F.2d at 711. The prosecutor retained control over the criminal case and offered to dismiss charges if the petitioner agreed to a favorable divorce settlement. The Fourth Circuit subsequently refused to extend *Ganger* to a case in which a private prosecutor also represented the victim's family in a civil action, since the petitioner failed to show that the attorneys used the prosecution to exact a more generous settlement of the civil action. *Jones, supra*, 776 F.2d at 1246. The financial interest in the civil action may have created a potential conflict of interest, but only actual conflicts of interest or misconduct warrants setting aside a criminal conviction.

This Court has exercised its supervisory power over the federal courts to insure that control over criminal prosecutions is maintained by a disinterested prosecutor. *Young, supra*. In *Young*, the attorney who had secured the injunction which the petitioner violated was entrusted with exclusive control over the subsequent criminal contempt prosecution. This Court held that counsel's interest in the original civil litigation created opportunities for conflicts to arise, but refused to bar private counsel's participation altogether. 481 U.S. at 807. In rejecting respondent's argument that private counsel may often be the most familiar with the allegedly contumacious conduct, this Court said:

> That familiarity may be put to use in assisting a disinterested prosecutor in pursuing the contempt action, but cannot justify permitting counsel for the private party to be in control of the prosecution.

481 U.S. at 806 fn. 17.

The exclusive control exercised by the private prosecutor further led this Court to reject harmless error analysis. The Court held:

> If this is the case, we cannot have confidence in a proceeding in which this officer plays the critical role of preparing and presenting the case for the defendant's guilt.

481 U.S. at 810-11. These statements suggest that disinterested control of public prosecutions adequately protects the defendant's interest in a fair trial. Nothing in *Young* suggests that private input or assistance to the disinterested prosecutor violates any right of the petitioner.

In *Young*, this Court avoided the necessity of reaching any constitutional issues by relying upon its supervisory authority. 481 U.S. at 809, fn. 21. In doing so, the Court noted the need for caution and the need for balancing the competing interests. *Id.* A criminal defendant's interest in receiving a fair trial is adequately protected when a disinterested prosecutor maintains control over the course of the prosecution. His interests are further protected by requiring private counsel to adhere to the same standard of conduct required of public prosecutors, including the avoidance of conflicts of interests. Tennessee's statutory

procedure therefore satisfies the supervisory requirements of *Young* since the public prosecutor maintains control of the criminal prosecution.

The petitioner has not shown that counsel had a conflict of interest. The petitioner is asking this Court to assume that counsel's employment by the victim's family required counsel to serve two masters. To the contrary, the family's interest in conviction was consistent with the State's interest in conviction. In the cases cited above, private counsel had professional duties regarding civil litigation which may have affected their judgment in criminal prosecutions. When an attorney pursues more than one legal objective, the resulting conflict of interest is apparent.

The source of counsel's compensation, standing alone, does not create this same conflict of interest. In criminal prosecutions, the private attorneys represent the State of Tennessee under the direction and control of the public prosecutor. The code of Professional Responsibility permits counsel to receive compensation from a person other than the client if the client consents after full disclosure. Counsel may not permit the person paying him to direct or regulate his professional judgment in providing legal services. A.B.A. Code of Professional Responsibility, DR 5-107. Although private counsel may be paid by the victim's family, the threat of professional discipline helps assure that private counsel will not be controlled by the family. In this case, however, the petitioner has not even shown that private counsel was paid. There is nothing in the record to refute the conclusion that the private attorneys volunteered their services to the victim's family.

The petitioner further asserts that Tennessee's procedure violates his right to equal protection. *Griffin v. Illinois*, 351 U.S. 12 (1956), prohibits the State from withholding procedural protection to a defendant simply because he cannot afford it. It has no application to the petitioner's complaint that an adverse party has greater resources. Carrying this argument to its logical extension, the equal protection clause would be violated any time a defendant is prosecuted by a governmental entity which has greater resources than the defendant.

Furthermore, the record fails to support the petitioner's claim of disparate treatment. The state court record does not reflect that the petitioner is a man of limited means. He comes before this Court with privately retained counsel and a printed petition.

The record does not support the petitioner's assertion that the victim's family was affluent. He asks this Court to draw that conclusion by claiming that only well-to-do Tennesseans could afford the luxury of hiring their own "private" prosecutors. Petition, p. 46 fn. 40. Since he failed to prove that counsel was hired, the suggested inference is based upon speculation from a silent record. Under the statute, private counsel may volunteer, or be paid by collective fundraising, or by interested groups such as victim's rights advocates, trade associations or community groups. The petitioner had an opportunity to prove these claims on the record, yet failed to do so.

In addition, a fair reading of the record suggests that the assistance of private counsel eased the considerable burden which the petitioner's case placed upon the local prosecutor. The petitioner was represented at trial by Mr.

Charles W. B. Fels, of Knoxville, whose reputation for outstanding advocacy has earned him national recognition. *Best Lawyers in America* (Woodward/White, Inc. 1991). Mr. Fels is a partner in a well-respected firm of five attorneys. *Tennessee Attorneys Directory*, p. B-42 (M. Lee Smith Publishers & Printer 1991). Counsel provided the petitioner a vigorous defense in which all of his legal rights were asserted and protected. Counsel's zealous pursuit of his client's defense generated a technical record of approximately 400 pages.

In contrast, the interests of the State were represented by a rural prosecutor's office with a criminal prosecution staff consisting of the district attorney general and three assistant district attorneys. *Tennessee Attorneys Directory, supra* at p. E-9. The assistant district attorney was assisted in this case by two attorneys who volunteered during a condolence call to the victim's grieving family shortly after the murder. The record does not show that these attorneys were paid for their assistance.

The facts of this case demonstrate that the petitioner received a fair trial. The victim was a seventeen-year-old boy who mistook the petitioner's wife for a friend or acquaintance who had played a Halloween prank upon him. The victim followed the petitioner's wife and children to the petitioner's home before discovering his mistake. The petitioner gave pursuit and located the victim's car in the neighborhood where the original chase began. The petitioner returned home, seized his .12 gauge shotgun and returned to the victim's home.

The victim was standing in his driveway when the petitioner approached him with the shotgun. As the victim backed away, the petitioner said, "This'll teach you," and struck the boy with his shotgun, leaving a tapered, wedge-shaped bruise on the left side of his neck. The blow stunned the boy, who fell against his car and asked the petitioner to leave him alone. Instead, the petitioner raised his shotgun and said, "If that didn't teach you, this will." He then discharged a single shot into the victim's mid-section.

The petitioner had ample opportunity to cool his passions during the time it took to go home, retrieve his shotgun and return to the victim's home. Instead of calling the police, the petitioner chose to assault and execute a helpless, retreating boy. It is a sad irony that the petitioner is now complaining of private vengeance and the family's desire to seek the punishment which they deem appropriate.

In view of the evidence, the petitioner's conviction of murder in the second degree establishes without question that the petitioner received a fair trial. The opportunity to cool off and the petitioner's statements during and preceding the murder would have supported a finding of premeditation. The overwhelming evidence that the killing was intentional precluded the jury from finding him guilty of anything less than murder in the second degree. There is nothing in the record to suggest that the jury was swayed by the family's grief or the participation of private counsel.

The evidence showed that the prosecution was controlled by the Office of the District Attorney General.

Only inference, not evidence, supports a contrary conclusion. Under these circumstances, the petitioner will be entitled to relief only if this Court is willing to hold that private assistance in criminal prosecutions is unconstitutional in any form or fashion. This Court has rejected such an extreme rule for the federal courts. *Young, supra.* Certainly, the due process and equal protection clauses of the Constitution do not impose a greater burden upon the states.

CONCLUSION

For these reasons, the State of Tennessee submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

Supreme Court, U.S.
FILED
MAY 7 1991
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No. 90-1139

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

STEVEN BENNETT,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TENNESSEE

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Tennessee "Hired Gun" Statute, Tennessee Code Annotated § 8-7-401, which permits private attorneys to participate in public prosecutions violates both the due process and equal protection provisions of the United States Constitution.

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No. 90-1139

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

STEVEN BENNETT,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

Petition for Writ of Certiorari To the Court of Criminal Appeals of Tennessee

---

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The petitioner, Steven Bennett, respectfully submits this reply to the respondent's brief in opposition to the petition for writ of certiorari filed in this case.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Tennessee is attached to the petition as part of the appendix. The opinion has been published. State v. Bennett, 798 S.W.2d 783 (Tenn.Crim.App. 1990).

JURISDICTION

The judgment of the Court of Criminal Appeals of Tennessee was entered on June 7, 1990. On October 15, 1990, the Supreme Court of Tennessee denied petitioner's application for permission to appeal. Petitioner now seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

The petitioner, Steven Bennett, was convicted of murder in the second degree and subsequently sentenced to seventeen years imprisonment.

Mr. Bennett appealed his conviction to the Court of Criminal Appeals of Tennessee, which affirmed the conviction on June 7, 1990. Mr. Bennett then filed an application for permission to appeal to the Supreme Court of Tennessee which was denied on October 15, 1990.

Mr. Bennett thereafter timely filed a petition for writ of certiorari before this Court. A reply to the State of Tennessee's brief in opposition to Mr. Bennett's petition is now respectfully submitted.

ARGUMENT

I. THE TENNESSEE "HIRED GUN" STATUTE VIOLATES DUE PROCESS BOTH AS WRITTEN AND AS APPLIED TO PETITIONER STEVEN BENNETT'S CASE.

In its brief in opposition to Steven Bennett's petition for writ of certiorari, the State of Tennessee, no doubt unintentionally, has mischaracterized Mr. Bennett's argument by stating that Mr. Bennett challenged Tennessee Code Annotated § 8-7-401 as violative of due process on its face and violative of equal protection as applied. (Brief in Opposition, p. 3). In fact, Mr. Bennett has challenged the statute as violative of due process as written and as applied, as well as violative of equal protection as applied. (Petition, p. 26-43).

The respondent avoids the issue of whether Tennessee Code Annotated §

8-7-401 was unconstitutional by couching the issue as requiring "prosecutorial misconduct." In so doing, the respondent overlooks this Court's repeated admonitions that "justice must satisfy the appearance of justice."[1] By allowing Steven Bennett to be prosecuted for the death penalty by a tandem of public and private prosecutors, Tennessee Code Annotated § 8-7-401 certainly failed to satisfy the "appearance of justice," nor was it in fact just.

The respondent further asserts that "[t]here has been no showing that the district attorney general would have handled the case any differently if the victim's family had made their wishes known personally. . . ." This assertion simply does not bear scrutiny. The district

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[1] In re Murchison, 349 U.S. 133, 136 (1955), quoting, Offut v. United States, 348 U.S. 11, 14 (1954).

attorney general did not seek the death penalty against Steven Bennett until after he had been approached and requested to do so by the two privately retained prosecutors.[2] The district attorney general only then filed a belated notice to seek the death penalty, citing but one, spurious aggravating circumstance which was

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[2] The respondent further concludes that the private counsel retained by the family of the victim "volunteered" their services for the trial during a condolence call. (Brief in Opposition, pp. 7,9). Nowhere is there support for such a conclusion. The record is silent as to whether the private prosecutors were paid a retainer or whether in an unusual act of charity they both volunteered their services for the lengthy trial that followed. Assuming, arguendo, that counsel for the victim's family was not paid, the inherent ethical conflict between the public and private interests still existed. The unsettling prospect remains that unpaid volunteers might if anything be more over zealous in their work than those who are motivated by more straight forward pecuniary interests. A complete copy of the evidentiary record concerning the private prosecutors is attached in the Appendix.

never supported by the evidence.

(Petition, 4-5).

Thus, the immediate impact of the private prosecutors at the very outset of the trial belies any statement by the respondent that the district attorney general would not have "handled the case any differently".[3]

The State of Tennessee further asserts that no "actual conflict" was

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[3] Respondent makes two other questionable statements about the nature of the record. The respondent states that "before trial, the petitioner requested a stipulation regarding the control of the prosecution." The record reflects that the request for a stipulation concerned the circumstances under which the State sought the death penalty, not that the State had relinquished control over the case. The State further argues that the assistant district attorney affirmed on the record that his office "made all decisions in a fair and non-prejudicial manner". (Brief in Opposition at p. 4). It is scarcely likely, under the circumstances of this case, that the representative of the State would have said anything else.

present for the privately retained prosecutors and thus there was no due process violation. (Brief in Opposition, p.5,). The State cites several federal cases for the proposition that the presence of private prosecutors is not a per se constitutional violation, absent an actual conflict of interest or other misconduct.[4] It bears noting that the cases cited by respondent involve collateral appeals, and that the respondent neglects to address those sister states which have held on direct appeal that the involvement of a private prosecutor is a per se violation of a defendant's constitutional rights.[5] "It

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[4] See e.g., Jones v. Richards, 776 F.2d 1244 (4th Cir. 1985); Stumbo v. Seabold, 704 F.2d 910 (6th Cir. 1983); Woods v. Linahan, 648 F.2d 973 (5th Cir. 1983); Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967).

[5] In the United States, several states have condemned the private practice. See, e.g., State v. Harrington, 534 S.W.2d 44 (Mo. 1976)(held unconstitutional); McKay v.

has . . . long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment."[6]

State, 90 Neb. 63, 132 N.W. 741 (1911)(held unconstitutional); Biemel v. State, 37 N.W. 244-248 (Wis. 1888)(held unconstitutional); Meister v. People, 31 Mich. 99 (1875)(held unconstitutional); Commonwealth v. Williams, 56 Mass. (2 Cush) 582 (1849)(limited to "peculiar circumstances" or "some stringent reason"); Born v. State, 397 P.2d 924 (Okla.Crim.App. 1964)("frowned upon" by Court); State v. Jensen, 178 Iowa 1098, 160 N.W. 832 (1917)(prohibited where attorney involved in civil and criminal matters arising from some facts); State v. Scott, 72 Idaho 202, 239 P.2d 258 (1951)(prohibited if involved in civil and criminal matters); Cantrell v. Commonwealth, 229 Va. 387, 329 S.E.2d 22 (1985)(private prosecutors hired by family of murder victim held to violate due process under Virginia constitution). While these opinions are certainly not binding on this Court, they are persuasive authority for the proposition that the use of private prosecutors in criminal cases is an archaic practice that should now be terminated by this Court.

[6] United States v. Addonizio, 442 U.S. 178, 185 (1979).

Moreover, the cases cited by the respondent underline the dangers involved in the use of private prosecutions. In Woods v. Linahan, the Court said,

> While we find no error is shown in this case, we note our concern about the practice of using a private attorney, paid by the family and friends of the victim, to prosecute persons accused of murdering a person dear to the people paying the private prosecutor. Human experience indicates that an attorney who is paid by a group of people to provide a service has some loyalty to those persons paying his fee. This loyalty may serve to prejudice the well recognized rights of a defendant accused of committing a crime.[7]

[7] 648 F.2d 973, 977 (5th Cir. 1983) (emphasis added).

Similarly, the Fourth Circuit in Ganger v. Peyton,[8] observed:

> At common law, a prosecuting attorney 'is the representative of the public in whom is lodged a discretion . . ., which is not to be controlled by the courts or by an interested individual.'[9]

Thus, the federal courts have warned of the same inherent dangers that exist in this case where prosecutors, public or private, engage in a prosecution with conflicting interests.

The respondent seeks to distinguish the very cases it cites by asserting that no "actual" conflict of interest existed in this case. It states that "the family's interest in conviction

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[8] 379 F.2d 709, 714 (4th Cir. 1967).

[9] Id. at 713 (emphasis in original).

was consistent with the state's interest in conviction." (Brief in Opposition, p.7).

This Court has often regularly held that the State's interest in a prosecution is not to seek a conviction as the respondent suggests; rather, the state's objective is to see that justice is done.

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."[10]

[10] Berger v. United States, 295 U.S. 78, 88 (1935) (emphasis added); see also, Young v. United States Ex Rel. Vuitton Fils S.A., 481 U.S. 787 (1987) (Blackmum,J. concurring).

This sentiment is echoed in the American Bar Association Model Code of Professional Responsibility, E.C. 7-13:

> The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.[11]

Thus, the interests of the State and the interests of the victim's family in the prosecution of Steven Bennett were not "consistent". To the contrary, they could not have been more disparate.

The district attorney general was present to ensure that justice was done. The lawyers employed as private prosecutors were present to see Steven Bennett convicted and put to death.

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[11] A.B.A. Code of Professional Responsibility E.C. 7-13 (emphasis added).

II. THE TENNESSEE "HIRED GUN" STATUTE DENIED STEVEN BENNETT EQUAL PROTECTION OF THE LAWS.

This Court has made it unmistakably clear that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[12]

The State of Tennessee asserts that Griffin v. Illinois, has no application to the instant case and that carried to its "logical" extreme, Mr. Bennett's argument is that the equal protection clause is violated any time a defendant is prosecuted by a governmental entity that has greater resources than the defendant. (Brief in Opposition, p. 8). Again, the respondent misapprehends the nature of Mr. Bennett's claim.

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[12] Griffin v. Illinois, 351 U.S. 12, 17-19 (1956).

Mr. Bennett does not insist that equal protection is denied whenever the state has greater resources than the defendant; indeed, it is difficult to imagine any prosecution wherein the State or governmental entity does not have greater resources than the individual defendant.

This, however, is not the effect of Tennessee Code Annotated § 8-7-401. Instead, it permits one man to be singled out for disparate treatment at the hands of the combined resources of the state and an additional outside party. It is this treatment that unfairly singled out Steven Bennett for a prosecution by a tandem of public and private prosecutors driven by public and private resources. The process and result were thus in a very real sense dictated by the disparate resources possessed by both the public and private

parties, bringing to bear the same evils feared in Griffin v. Illinois.[13]

The State of Tennessee further seeks to minimize the impact of the private prosecutors by insisting that the prosecution was "consider[ably] burden[ed]" by the quality of Mr. Bennett's defense. The State suggests that the prosecutor's office thus "needed" the resources of a private family to meet this "burden". (Brief in Opposition, p. 8-9).

In so arguing, the State does a disservice to the facts and the law. As a matter of record, trial counsel for the defense entered the case only after the private prosecutors had persuaded the State to seek the death penalty. Thus, it was Mr. Bennett not the State who required the

[13] 351 U.S. 12 (1956).

experienced counsel to meet the "burden" of a death penalty trial.

More important however, where error of constitutional magnitude is present and a citizen has been denied the fundamental protection which our Constitution seeks to afford, the presence or quality of any particular counsel is of no consequence. The harm that has occurred remains. The Constitution does not concern itself with whether a party was well represented, it concerns itself with whether the fundamental values of this society have been preserved in its Courts.

The State further seeks to divert attention from the central constitutional question by an emotive claim that the evidence supported a conviction of second degree murder, arguing that the deceased was a "helpless, retreating boy". The State overlooks the fact that this same

"helpless, retreating boy" was a seventeen year old high school senior who had just attempted to perpetrate a murderous assault on two mothers and their four helpless children. The State further overlooks the remaining evidence which might well have supported a verdict of justifiable homicide or invcluntary manslaughter had the jury not been conditioned by two private prosecutors and one assistant district attorney to consider the death penalty in a case in which this ultimate form of punishment was never warranted by the law or the facts.

The fact that the jury did not condemn Steven Bennett to death but instead returned a verdict on a lesser charge, does not obviate the constitutional harm that was committed in this case. Steven Bennett was wrongly and impermissibly singled out for disparate treatment - treatment rarely

imposed on other individuals in the State of Tennessee. This disparate treatment constituted a denial of equal protection of the laws.[14]

III. CONCLUSION

Justice is a process, not a result. The impartiality and integrity of our judicial process is poisoned by the slightest suggestion that private partisan interests should be given a visible role in the public prosecution of public wrongs. The medieval system of prosecution by private parties no longer is condoned in

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[14] Almost jeeringly, the State suggests that Steven Bennett is not a man of limited means because he continues to be represented by private counsel. As the record of the sentencing hearing clearly reflects, counsel agreed to represent Mr. Bennett on a pro bono basis on appeal, after the trial court found Mr. Bennett was indigent. Old fashioned as it may seem, indigent citizens represented by private counsel are still permitted to appeal meritorious claims "all the way to the Supreme Court", even if their lawyers are unpaid.

England, its birthplace, nor in the courts of this Republic. It is more than timely for this Court now, as a question of first impression, to exercise its jurisdiction over this case and ultimately end this unseemly and insidious practice from the ancient past.

Respectfully submitted,

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THE COURT: The Court will take the motion under advisement. Now, there are three Motions Regarding Private Prosecutors. A Motion Regarding the Constitutionality of the Act and two Motions to Excuse the Private Prosecutors. Mr. Fels, what do you say?

MR. FELS: Your Honor, with regard to the first of the three, that is to say our number three, we would request permission to have a short evidentiary hearing to make a -- as a matter of record the argument which we have set forth orally at the conclusion of that. With regard to issue four and five, tabs four and tabs five, those are questions of law that we are prepared to argue at any time the Court wished to hear those arguments.

THE COURT: Would you outline the evidence you seek to introduce?

MR. FELS: Yes, Your Honor. Respectfully, we would seek to call on Mr. Thomas or Mr. Cunningham for the purpose of establishing that they have been requested to represent the family of Lance Russell in this. That as a result of that request they have, in fact, conferred with the District Attorney's Office and communicated the view that the death penalty should be sought on the facts of this case. That as a result in part at least of those consultations, the State decided some two weeks before the last trial date to seek the death penalty. That Mr. Thomas has been in practice in Blount County for approximately ten years, has been active in the affairs of the Democratic Party, is presently serving on the State wide

Executive of the Democratic Party. That his law partner, Mr. Cunningham, is equally well known and has been equally active in the affairs of the Republican Party, and serves as the chairman of the Republican Party for Blount County. That as a result of their active practice in Blount County, and as a result of their commendable interest in the political system, they personally can be expected to know a number of members of the venire in addition to those that might be known by the District Attorney General Ballard. That as a result of their active practice here in private work, they might also be expected to know a wide number of individual members of the venire. And that, finally, their duties to their private client, that is to say the family of Lance Russell . . .

THE COURT: Are you discussing an evidentiary matter at this point?

MR. FELS: Yes, Your Honor.

THE COURT: On duty?

MR. FELS: Yes.

THE COURT: What -- very well. Proceed.

MR. FELS: That there are areas in which their duty to their client might come in conflict with the American Bar Standards governing the function of the prosecution in criminal cases. If, in fact, counsel would agree that that is an accurate statement, we'd be prepared to proceed by means of that proffer, rather than by the necessity of actually calling that testimony.

THE COURT: Gentlemen, are you prepared to stipulate any of the matters?

MR. HAWKINS: Yes, Your Honor, we . . .

THE COURT: What can you stipulate, General?

MR. HAWKINS: If I could have just a second, if the Court please?

THE COURT: Very well. --

MR. HAWKINS: If the Court please, we can stipulate everything Mr. Fels said with one exception, that we insist and do not stipulate that the only reason that the aggravating circumstance was filed by the District Attorney General was because Mr. Thomas and Mr. Cunningham related that's what the family wanted. That there was also -- and is factual basis for that, and that is the reason that the aggravating circumstance was filed. And we differ with regard to Mr. Fels on that, if I understood him correctly.

MR. FELS: Your Honor, I think there may be a misunderstanding there. I think my statement was, that as a result of that representation in part the decision was made. I did not seek to attribute the District Attorney quite the same impact as the statement Mr. Hawkins has made.

MR. HAWKINS: Well, if the Court please, we would stipulate that the request was made. But again, we do not seek to stipulate that in any part that it plays a difference in whether an aggravating circumstance is so filed.

THE COURT: What . . .

MR. HAWKINS: But the rest of it we can stipulate.

THE COURT: With regard to the stipulation about the conflict on duties?

MR. HAWKINS: Perhaps I didn't understand the Court?

THE COURT: Well, are you -- as I understood the statement of Mr. Fels, he says he will intend to offer proof that the obligation of the private prosecutor to his client comes in conflict with the obligations, the ethical obligations of a State prosecutor.

MR. HAWKINS: Well, if the Court please, we do not stipulate that in this particular case. And we would further state that our evidence would be that the District Attorney General's Office is the one deciding the issues with regard to the case with regard to discovery and evidentiary and all of those standards that apply to prosecutors, and that the -- Mr. Cunningham and Mr. Thomas are representations of the State only at the discretion of the District Attorney General's Office. And we do not believe

the evidence will so show that the way they're handling this case comes in conflict with the standards imposed on prosecutors.

THE COURT: All right. There are two areas that are not stipulated. In that event you may want to call witnesses, Mr. Fels.

MR. FELS: Thank you, Your Honor. Can I confer -- consult with Mr. Black a moment?

THE COURT: You may. --

MR. FELS: Yes, Your Honor. We would request permission to call Mr. Thomas briefly for this purpose.

THE COURT: Very well. Mr. Thomas, take the witness stand. You may testify as an officer of the Court.

MR. THOMAS: Thank you, Your Honor.

MR. FELS: We certainly waive the oath, Your Honor.

THE COURT: Pardon?

MR. FELS: We certainly waive the oath.

D. Kelly Thomas, Jr. was called, and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FELS:

Q For the record, sir, your name and place of employment?

A D. Kelly Thomas, Jr. I'm employed in Blount County as an attorney.

Q And how long have you been employed as an attorney in the State of Tennessee?

A Ten years.

Q And during the course of that ten years, sir, have you ever previously acted

as a private prosecutor in the State of Tennessee?

A I don't believe I have.

Q Have you ever acted as a prosecutor of any kind in the State of Tennessee?

A No.

Q Are you familiar with the ethical standards applied to prosecuting officials by the A.B.A. standard for the prosecution?

A I am only familiar with the theory, not the specific standards.

Q Are you familiar with the theory, sir, that a prosecutor is charged with the duty to pursue both the innocent and the guilty equally and when the prosecuting official perceives that injustice may be done to the innocent, to terminate a prosecution?

A Yes.

Q Is it true, sir, that you have been requested by the family of Lance Russell to serve as a private prosecutor in this case, along with your partner Mr. Jerry Cunningham?

A That's true.

Q And as part of your representation have you been requested to seek the death penalty on behalf of the family?

A We have been requested on behalf of the family to imprt that feeling to the Attorney General's Office.

Q And have you done that, sir?

A We did that.

Q All right. And did you do that because that was the request of your client?

A In part.

Q And after you made that representation to the District Attorney's Office, did the District Attorney's Office subsequently seek the death penalty?

A Oh, yes. It was sometime after we'd made the -- gave them the information.

Q As a private prosecutor in this case, is it your intention and the intention of your law partner to engage as vigorously and as fully as possible in the trial of this case under the director of the District Attorney?

A We will certainly do whatever General Ballard allows us to assist him to the best of our ability.

Q And on behalf of your client, is your -- is it your intention to seek to argue that the death penalty is appropriate in this case?

A If the facts of the case get to the point where that argument is relevant and if we feel at that time that the facts justify it, then we will of course do that.

Q In fact that is your mission on behalf of your client, is it not?

A No. That's a part of it at this point, but that's not all of it.

Q So, it is fair to say that it is part of your mission on behalf of your client to seek the death penalty in front of a jury in this case?

A Assuming that the facts are justified -- justify it and that the Attorney General concurs.

Q Just briefly, sir, you have been active in the affairs of the Democratic Party, is that correct?

A That's true.

THE COURT: I understand all of that matter is stipulated.

MR. FELS: Thank you, Your Honor. We have nothing further, Your Honor.

THE COURT: Any questions?

MR. HAWKINS: We have no questions.

MR. BLACK: May I ask a question, Your Honor. I don't know if that's the proper order.

THE COURT: You may.

DIRECT EXAMINATION

BY MR. BLACK:

Q Mr. Thomas, and of course you -- I'm not sure it's in the record, but you and Mr. Cunningham practice law together, is that correct?

A That's true.

Q And have you and Mr. Cunningham collectively been employed for the purpose

of securing a conviction in this case on behalf of the family?

A We have not been employed.

Q Okay. Have you been . . .

A I believe Mr. Fels' question more accurately set that out.

Q Okay. You're -- have you been retained on behalf of the family?

A We've been requested to assist in the prosecution by the family and said we would.

Q All right. Is there an attorney client relationship between your firm and the family?

A I believe there is.

Q And as a part of that attorney client relationship have you been requested and is it a part of your job as you understand that attorney client relations

hip to seek and secure a conviction in these two cases?

A Our job is to help the Attorney General prosecute this case and at this point that is to get a conviction.

Q And that's what you've been asked to do?

A That's what we've been asked to do, is to help the Attorney General.

Q Have you been asked to seek a conviction?

A Yes, assuming the case goes to trial.

MR. BLACK: All right. That's all.

MR. HAWKINS: I have no questions.

THE COURT: You may step down, Mr. Thomas. Call your next witness.

MR. FELS: That would conclude our proof in this regard, Your Honor.

THE COURT: Very well. You may present further argument.

MR. FELS: Thank you, Your Honor. Your Honor, the thrust of this argument is not so much the Constitutionality of the statute itself, although we have grave questions about that. It is not so much the question as to when by terms of the statute an individual becomes a victim of crime and can retain private counsel, although we have concerns about that, but the thrust of this motion is rooted in due process and equal protection and has to do with fundamental fairness in a death penalty case. In sum, Your Honor, four highly seasoned prosecuting counsel seek the death of a truck driver with an eighth grade education. I would not for a moment

afford any man the opportunity to represent my client. And if your Honor says that this is to be four against one, I shall do my steadfast best to represent the interest of Steve Bennett. But in many respects, Your Honor, given the wealth and talent I see across from this Courtroom, I'm reminded of shooting fish in a barrel, except that in this case there's only one fish, it's a small barrel, and there are four people that are taking aim in it. Fundamentally, Your Honor, it's not fair, it's not right for some individual Defendants in our system to be singled out for this extra special attention. If it were this law would permit families of substance or means, I'm not saying that's the case in this case, but it would permit families of substance or means who feel outrage, understandably, to retain the most

famous, the most competent private counsel in their jurisdiction to assist already highly experienced, well respected, public prosecutors. And the difficulty with that is that private motives for the prosecution can become inextricably intertwined with public motivation for a public prosecution. Whether that happened or not in this case is not for us to say. I have the highest respect for the four individuals who are across the Courtroom from me. And I am confident that if anyone would try to avoid that intermixture it is Mr. Ballard, Mr. Hawkins, Mr. Cunningham, and Mr. Thomas. But inevitable when lawyers are retained to seek the death penalty or to seek conviction, their interest on behalf of their private clients are inevitably different than the interest of the public official that is elected to apply the laws

fairly and impartially, and certain states have so found. Wisconsin has struck down a similar provision. Missouri has struck down a similar provision. In murder cases, Your Honor, in which the verdict came back guilty the Supreme Courts in those states reversed on the gounds [sic] that this combination is really just unfair. The words of those Courts have already been cited to Your Honor and I need not dwell upon them. But it is essentially that to the effect that public wrongs should be prosecuted by public officials, private wrongs by private parties. In this particular case if we proceed in this fashion we'll be voir direing the jury that may well be known to the chairman of the Republic Party, to a leading member of the Democratic Party, in a county with a relatively small population, with a -- as

we understand it, total electoral roll of some thirty-nine thousand people, many of whom who participate in public electoins [sic] and might well be known to these fine attorneys. We think this is a dangerous practice. It's loading the odds. It's not fair to do it and it's unnecessary to do it. And rather than have the Supreme Court or any Court have to review this down the line, the appropriate things is to head it off here and now. And we respectfully request the Court to do so on behalf of these individuals who face trial at the hands of the State.

THE COURT: Mr. Black.

MR. BLACK: Nothing further, Your Honor.

THE COURT: General, what to you say for the State?

MR. HAWKINS: If the Court please, we can certainly take time to talk about Mr. Fels and Mr. Black. The Court, I know, is well aware of the ability of Mr. Black. He is a fine trial attorney and one of the best in this part of the State or this party of the Country. The Court is well aware -- Mr. Black being in this county and having represented many, many criminal Defendants. And Mr. Fels -- I appreciate the comments Mr. Fels had about us, but Mr. Fels for many, many years, as the Court may be aware, was the Assistant U.S. Attorney. He handled all types of criminal prosecutions. He is the one who is most closely associated with prosecuting in this part of Tennessee many sheriffs, many high officials of government who were involved in corruption and the dealing of drugs, and one of the finest and best

prosecutors that I've ever had the pleasure of knowing. And he also is one of the best and efficient defense attorneys it's been my pleasure to know. Mr. Fels should not and will not, and of course during the proceedings and during the trial, take a back seat to anyone. And I noticed these two fine attorneys here, and they also earlier today has their private investigator with them. This isn't going to be a contest of four lawyers against one, or four lawyers against two, or as Mr. Fels puts it, a shooting fish in a barrel. This will be a case where I am sure on behalf of the Defendants all the material facts on their side will come out, all of the witnesses that could have been called will be called, all of the experts will analyze the evidence that in their opinion should analyze the evidence. Let me go

further with regard to this, as the evidence before the Court is that Mr. Cunningham and Mr. Thomas have been asked to assist in the prosecution and they have done so by the statute that the Tennessee Legislature has passed. They serve at the discretion of the District Attorney. And as by the tactics, the matters of investigation, the matters of Rule 16 Discovery, and all the rules that pertain to handling this Defendant in a fair and non-prejudicial manner, and keeping with the Constitution of Tennessee, rest on the shoulders of the District Attorney General's Office. That's the way it has been up to this point and that's the way it has been through the -- and that's the way it will be through the trial. Mr. Cunningham -- we're glad to have Mr. Cunningham and Mr. Thomas assisting us as

means of that statute. We believe the statute is Constitutional. As this Court well knows even before this statute was passed, at least in in this jurisdiction, private prosecutors were allowed to help and assist the District Attorney General's Office. We believe the statute is Constitutional. That the rights of this Defendant will be protected by the Court, by his lawyers and in keeping with the prosecutoral [sic] standards of the District Attorney General's Office and by those standards which have been announced previously. We ask the Court to overrule the motion.

THE COURT: Now, let me be sure -- Mr. Fels, you have covered all three motions in your opening argument?

MR. FELS: Yes, Thank you, Your Honor.

THE COURT: Do you have any closing argument to make in the matter?

MR. FELS: Nothing further. Thank you, Your Honor.

THE COURT: Prior to the 1978 statute it was certainly a custom in this part of Tennessee for private citizens to employ a private attorney to prosecute criminal matters. And sometimes the District Attorney or one of his Assistant in fact participated in that prosecution in the Courtroom and sometimes they did not, depending on the office and the jurisdiction of the particular case. Of course history does not overcome a Constitutional defect, if there be one. In 1978 the Legislature enacted the following: "A victim of a crime or the family members of a victim of crime may employ private counsel to act as co-counsel with the

District Attorney General or his deputies in trying cases with the extent of participation of such privately employed counsel being at the discretion of the District Attorney General. The District Attorney General or his deputy shall make the final and concluding argument. The privately retained counsel shall immediately inform the District Attonrey [sic] General of his employment." Now, a number of arguments have been made as to the unconstitutionality or impropriety of having private counsel in this case, one of them the Court notes with interest is that a jury may perceive a greater number and possibly an enlarged quality in the prosecution. That may or may not be so. The Court does not believe that that is a matter that rises to a Constitutional level. It has been perceived by attorneys

in both criminal and civil matters that sometimes it is to the detriment of a party to have too much counsel in appearance and sitting on one side of the Courtroom because it will have the exact opposite effect of giving the other side the appearance of the underdog, and therefore have the sympathy of the jury that is trying the case. I can remember that being discussed in a number of cases, and although a lawyer might like to take his usual place on one side of the Courtroom, he was instructed not to, so that there would not be -- appear to be too much manpower on one side of the Courtroom. But it appears at this point that General Ballard and General Hawkins and Mr. Cunningham and Mr. Thomas will be here in this case. The Court does not find that the three motions have merit and overrules

them at this time. The Court also observed that Mr. Fels is probably correct that it will be more difficult to select a jury because there will be many more people who know Mr. Thomas and Mr. Cunningham in one way or another, and will increase the probability that there may be challenges for cause with a larger number of the prospective veniremen, but the Court doesn't believe that it can overrule the Legislature on the basis of that increased difficulty for the Court in getting the matter quickly to trial. Now, gentlemen, I believe this brings us the Motion for Change of Venue. And in that regard, Mr. Black, are you also asking for a change of venue?

MR. BLACK: Yes, Your Honor.

THE COURT: Very well. Let me ask you -- you do intend to offer evidence in this motion?

MR. FELS: Yes, Your Honor. I have two brief witness and I have an affidavit to submit to the Court.

THE COURT: I was going to ask by what means -- you have two witnesses?

MR. FELS: Two witnesses and an affidavit. Thank you, Your Honor.

THE COURT: Very well. If you will call your first witness.

MR. FELS: Thank you.